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IN THE

Supreme Court of the United States

October Term, 1968
No. 234

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

HODGE, JACKSON, KUMLER & CROSKEY,
By MORTON B. JACKSON,
Suite 1651,
1901 Avenue of the Stars,
Los Angeles, Calif. 90067,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Tonkin Corporation, dba Seven-Up Bottling Company of Sacramento, Petitioner herein, respectfully replies, pursuant to U.S. Sup. Ct. Rule 24(4) to Respondent's Brief in Opposition.

Statement in Reply.

Respondent's statement of the issue herein assumes the existence of a key element which, actually, is wholly absent from this case under the facts, established Board policy, and settled law; namely, a question of representation.

Moreover, it completely avoids and ignores the significant questions of law and the consequent uncertainty in national labor policy created by the Supple-

mental Decision of the Board and the Opinion of the Court below. These questions have been set forth in the Petition (Pet. pp. 3-4).[1]

In characteristic keeping with its method of formulating its statement of the issue, Respondent similarly distorts the factual picture by cutting and pasting from the record in order to conform the evidence to Respondent's preconceived view of what the case ought to be (as distinguished from what it actually is). By way of reply, we invite the Court simply to compare the statement of facts in the Opinion with that contained in Respondent's Brief in Opposition. Specifically, we would draw the Court's attention to some of the more startling examples of this synthetic "factualizing."

A. The Friday Meeting Between the Tonkins and the Membership.

1. Respondent makes no mention of the Tonkins' wage and overtime offers (Resp. Br. p. 3);

2. The Opinion states and the record abounds with evidence establishing that Harry Tonkin proposed a Three Dollar ($3.00) per week wage increase; offered to pay time and one-half overtime; promised to match any wage increase paid by other local soft drink companies; and discussed sick leave benefits, paid holidays and vacations, bonuses, and pension plans (Op. p. 2).

B. Subsequent Membership Meeting.

1. Respondent merely says that the employees discussed the company's contract proposal (Resp. Br. p. 3);

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[1] "Pet." refers to the Petition; "Resp. Br." refers to Respondent's Brief in Opposition thereto; "Op." refers to the Opinion of the Court below, found in Appendix "A" of the Petition.

2. The Court below found that "there was a general consensus to accept the proposals in view of the overtime and 'most favored nation' terms," and that "it was agreed that representatives would meet later with the company to relate the results of the meeting." (Op. p. 3). (The record clearly shows that the membership authorized their officers to accept the offer).

C. Subsequent Meeting Between Management and Union Negotiating Committee.

1. Respondent states that a small group of employees went to the company's office to confer with the Tonkins. Respondent then baldly asserts that the Tonkins either "rejected the employees' request for concessions on holidays, a bonus plan, sick leave, and health and welfare, or replied that the company would do the best it could, but refused to incorporate these into the written contract." (Resp. Br. pp. 3-4);

2. The record abundantly supports the facts that

(a) The "small group of employees" consisted of the Incumbent's officers, who comprised its negotiating committee;

(b) They informed management that the men had agreed to accept the wage increase and the proposal to pay overtime if the company would agree to match any further increases in wages of similar local industries (the "most favored nation" clause already offered);

(c) Tonkin agreed that a man's birthday would be considered a paid holiday;

(d) Tonkin also agreed that the men would not be docked when they were sick;

(e) Management agreed to look further into the bonus system and improve it, (a commitment, in fact, fulfilled.)

(f) It pointed out that it had voluntarily upgraded the disability plan the year before, and agreed to consider a pension plan when financially able.

Further, the Opinion emphasized that *agreement was reached,* pointing out that "When the meeting broke up, *the parties shook hands.* The independent informed management that they would have to submit *the agreement* for ratification to the full membership and that a meeting would be held Monday morning, April 1, for that purpose." (Emphasis added; Op. pp. 3 and 4).

D. Mailing of Contract to the Board on Behalf of Incumbent.

1. Respondent states that the Tonkins "summoned" Hill and Barwise "to question them about the letters from the Board . . ." and intimates that they coerced and dominated the Incumbent officers by sending a copy of the contract to the Board on behalf of the Incumbent;

2. The Opinion feels that the sending in of the contract "supports the Board's finding that Petitioner wanted to keep the Teamsters from representing his employees," (a desire, Petitioner submits, is not violative of the Act in this case).

In fact, however, Hill approached management after work on April 5, and the Opinion makes it clear that it was he who asked management if they had received

the letter from the Board and who stated that he had no means by which to make copies of the contract (Op. p. 5). Management offered to send in a copy for the incumbent if it desired, whereupon Hill sought advice from the Teamsters. Upon being told by them (with obvious and perhaps deliberate error) that it made no difference whether or not they sent a contract in, "Hill informed management that as far as the Union was concerned, management had *complete discretion* in either sending a copy for the Union or not." (Emphasis added; Op. p. 5).

E. The Formation of the Incumbent Union.

1. In its eagerness to tar Petitioner with the brush of Anti-Teamster bias, Respondent permits itself to take liberties with the limits of candor. It persists in declaring that the Incumbent was formed "to keep the Teamsters out", in an obvious attempt to link the Tonkins to that statement and attribute its implications to them. But Respondent does not advise the Court that the testimony upon which it bases this assertion establishes that this motivation was not that of the Tonkins, or even the *former* management, but was that of the employees who established the Incumbent many years before;

2. The facts are undisputed that the Incumbent "had been the bargaining representative for many years for Petitioner's plant employees and route salesmen. It was formed originally *by employees of Petitioner* in order (as one of the founding employees testified) to keep the Teamsters Union from gaining any representation." (Emphasis added; Op. pp. 1 and 2);

3. This original anti-Teamster motive is entirely irrelevant to the question of Petitioner's state of mind *vis a vis* the Teamsters:

(a) It is far too remote;

(b) It was the *employees,* not management, who desired to keep the Teamsters from gaining any representation;

(c) In any event, the management of the company at the time of the Incumbent's inception was wholly different from and unrelated to the Tonkins, who purchased the company barely a year before the events under review.

Any former anti-Teamster animus on the part of the employees, therefore, cannot factually, equitably or logically be attributed to the Tonkins, nor is it probative of their state of mind. Respondent's repeated implications to the contrary can only be interpreted as a deliberate attempt to mislead the Court.

Conclusion.

The evidence taken as a whole, and the proper view and perspective of this case raise questions of law and labor policy of such disturbing breadth and sweep as to compel their consideration by the Court.

Petitioner therefore urges that this Petition be granted.

Respectfully submitted,

HODGE, JACKSON, KUMLER & CROSKEY,

By MORTON B. JACKSON,

Attorneys for Petitioner.